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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MOHAMMED KHAYATIAN, Defendant and Appellant.	B197577 (Los Angeles County Super. Ct. No. BA255295)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph A. Brandolino, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A Los Angeles County grand jury indicted defendant Mohammed Khayatian, the owner of a vehicle towing company, on one count of conspiring with his employees to violate provisions of the Vehicle Code and to commit perjury, extortion and grand theft. Defendant was convicted of the conspiracy charge and placed on probation subject to making restitution to his victims and other conditions. We affirm.

FACTS AND PROCEEDINGS BELOW

Defendant purchased American Automotive Center, also known as USA Towing, in October 2002. The undisputed evidence showed that during the period of the alleged conspiracy, October 2002 to January 2005, defendant's tow truck drivers routinely towed vehicles from private property without the presence of the property owner or the owner's employee or agent as required by Vehicle Code section 22658, subd. (*l*)(1).[1] Furthermore, defendant admitted at trial that he told his tow truck drivers to tow illegally parked vehicles from private property without the property owner or an agent being present so long as USA Towing had a contract with the property owner for such removals.

In his defense, defendant testified he believed that as long as he had a valid contract with the property owner he could tow vehicles from the property without the owner or an agent being present, notwithstanding the provisions of section 22658, subdivision (*l*).

The jury convicted defendant of one count of conspiracy "[t]o commit any crime." (Pen. Code, § 182, subd. (a)(1).) The crimes that the jury found defendant conspired to commit were (1) removing a vehicle from private property without the presence of the property owner or agent in violation of section 22658, subdivision (*l*)[2]; (2) the unlawful

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[1] All statutory references are to the Vehicle Code unless otherwise stated.

[2] Although the issue was never raised at trial or on appeal, towing vehicles from private property without the presence of the owner of the property or the owner's agent, as required by section 22658, subdivision (*l*), did not become a *crime* until 2007 with the enactment of chapter 609, section 3, Statutes 2006. Defendant was charged with violating the statute between 2002 and 2005. Nevertheless, defendant admitted that during the period 2002 and 2005 he and his employees agreed not to comply with the provisions of section 22658, subdivision (*l*) regulating the removal of vehicles from private property thus,

taking of a vehicle in violation of section 10851, subdivision (a); (3) grand theft of personal property in violation of Penal Code section 487; and (4) offering false evidence in violation of Penal Code section 132.

The trial court suspended imposition of sentence and placed defendant on five years of formal probation with several conditions including paying $40,000 in restitution to persons whose vehicles he unlawfully towed and a life-time ban on owning or being employed by a towing company.

Defendant filed a timely appeal.

DISCUSSION

Although he approaches the issue from different angles, defendant's argument on appeal boils down to the claim that there is insufficient evidence to support his conviction for conspiracy to commit "any crime" under Penal Code section 182, subdivision (a)(1). We reject defendant's argument because the record contains sufficient evidence to support defendant's conviction of conspiring with his employees to violate section 10851, subdivision (a), unlawful taking of a vehicle. Because the prosecution only needed to prove that defendant conspired to violate section 10851 in order to establish a conspiracy to commit "any crime," we need not decide whether the evidence supported the jury's additional findings that defendant conspired to commit grand theft and offering false evidence.[3] (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129 [reversal is not required for insufficient evidence to support one theory for conviction of a crime if there is sufficient evidence to support another theory for that conviction].)

I. SUFFICIENCY OF THE EVIDENCE OF CONSPIRACY TO VIOLATE SECTION 10851

A conspiracy requires an agreement between two or more persons with the specific intent to agree and to commit an offense, followed by an overt act committed by

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as we explain below, making them guilty of conspiracy to violate section 10851, unlawful taking of a vehicle, as found by the jury.

3 Nor need we decide whether the court should have given an instruction pertaining to third-party liability on the part of defendant's employees.

one or more of the parties for the purpose of accomplishing the object of the agreement. An "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to accomplish the conspiracy's object. (*People v. Jurado* (2006) 38 Cal.4th 72, 120.)

At trial, defendant admitted that notwithstanding the requirements of section 22658, subdivision (*l*), he and his tow truck drivers agreed that the drivers would tow cars from private property despite the absence of the owner of the property or the owner's agent so long as they had contracts with property owners for towing illegally parked vehicles on the property. In addition, the undisputed evidence showed that the drivers did in fact tow cars in the absence of the property owners or owners' agents. Therefore, the People presented sufficient evidence of a specific intent of defendant and his drivers to agree to violate section 10851, subdivision (a) which states in relevant part: "Any person who . . . takes a vehicle not his or her own, without the consent of the owner thereof, and with the intent to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense . . . ." The unlawful towing of a vehicle with the specific intent to deprive the owner of possession constitutes a violation of section 10851, subdivision (a). (*People v. Barrick* (1982) 33 Cal.3d 115, 134-135.)

Tow truck companies and their employees are shielded from criminal liability under section 10851 by section 22658 which authorizes a towing company to remove a vehicle from private property after obtaining the written authorization, and in the presence, of the property owner or the owner's agent.[4] As explained in *Penaat v. City of San Jose* (1972) 24 Cal.App.3d 707, 710, "[T]he general provision of section 10851 . . . relating to auto theft by '*[a]ny person* who drives or takes a vehicle not his own, without the consent of the owner thereof,' must be considered modified or controlled by the

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4 At the time of the alleged conspiracy section 22658, subdivision (*l*)(1) provided in relevant part: "A towing company shall not remove or commence the removal of a vehicle from private property without first obtaining written authorization from the property owner or lessee, or an employee or agent thereof, who shall be present at the time of removal."

particular provisions of the Vehicle Code authorizing the removal and impounding of illegally parked vehicles under the direction of a police officer." (Italics in original.) Section 22658 authorizes the removal of illegally parked vehicles under the direction and in the presence of the owner of the property or the owner's agent. It follows that if the towing company does not remove the vehicle in the manner authorized by the statute it loses the statute's protection.

II. ENFORCEABILITY OF SECTION 22658, SUBDIVISION (*l*)

Defendant contends that he was not required to comply with the provisions of section 22658, subdivision (*l*) between October 2002 and January 2005 because subdivision (*l*) was unenforceable during that period. This contention lacks merit.

In July 2000, the Ninth Circuit issued an opinion holding that section 22658, subdivision (*l*) was preempted by federal law and affirming a permanent injunction against application of the provisions of the statute to towing operations in Santa Ana. (*Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, 1044, 1048, 1052 (*Tocher*).) In February 2001, however, the First District Court of Appeal held that section 22658, subdivision (*l*) was *not* preempted by federal law and affirmed civil fines and penalties against a tow truck operator for nearly 1000 violations of that and other statutes and municipal codes regulating vehicle towing. (*People ex rel. Renne v. Servantes* (2001) 86 Cal.App.4th 1081, 1084, 1090 (*Renne*).) Thus, when defendant commenced his towing business in October 2002, section 22658, subdivision (*l*) was enforceable everywhere in California (except the city of Santa Ana**).**[5] (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III. DEFENDANT'S MISTAKE OF LAW DEFENSE

A defendant's good faith belief that his actions were legal is an affirmative defense to a conspiracy charge because it negates the element of specific intent to violate the law required for a conspiracy. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747,

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5 Defendant does not contend he did any towing in Santa Ana.

779.) Here the court instructed the jury on defendant's good faith defense and both sides presented evidence on the issue. The jury rejected the defense and, as we explain below, its decision is supported by substantial evidence.

Defendant argues that his conviction for conspiring to violate section 10851 must be reversed because the record contains insufficient evidence that he lacked a good faith belief that under *Tocher*, he was not required to comply with the provisions of subdivision (*l*) of section 22658. We disagree. On appeal we view the evidence in the light most favorable to the judgment and, as we explained above, the evidence is sufficient to support the judgment in this case. Thus, even assuming defendant presented evidence that could have supported a jury finding in his favor on his mistake of law defense, conflicting evidence does not entitle him to a reversal of his conviction. (*People v. Thomas* (1992) 2 Cal.4th 489, 514 [if substantial evidence supports jury's finding, substantial evidence that would support a contrary finding does not warrant a reversal of the judgment].)

Defendant claims that the trial court committed prejudicial error in refusing to allow him to call Fullerton police officer Rocco Grimaldi as an expert witness on the uncertainty of the towing law after the Ninth Circuit's opinion in *Tocher*. We conclude the court erred in excluding the testimony but that the error was harmless.

According to defendant's offer of proof, Grimaldi had 14 years experience in enforcing California's towing laws and was viewed as an expert on the subject by his peers. Grimaldi would have testified that during the period of the alleged conspiracy the law was in a "state of flux" and "ambiguity" as the result of the *Tocher* and *Renne* opinions." This testimony would have supported defendant's mistake of law defense because the jury could, but not necessarily would, reason that if a law officer with 14 years experience in enforcing the towing law found the state of the law after *Tocher* and *Renee* confusing, ambiguous and "in a state of flux" then a tow truck operator with much less experience could honestly hold a mistaken belief about the law.

Considering the record as a whole, however, it is not reasonably probable that even if Grimaldi's testimony had been admitted, the jury would have accepted

defendant's claim that he was acting under a good faith mistake of law when he authorized his drivers to tow vehicles from private property without the property owner or his agent being present. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence does not show that defendant ever spoke to Grimaldi about the state of the law following the *Tocher* and *Renne* decisions. Defendant testified that his understanding of the law came from reading the statute and from Manouchehr Eslanaian, the person who sold him the towing business; Manouchehr Kaghazi, the person in charge of the towing operation when he bought the business; Gregory Palmer, the Buena Park city prosecutor; Mark Rosen, the attorney he retained to advise him on the legality of his towing operations; and the municipal codes of the cities of Bellflower and Santa Fe Springs.

Of these sources, only Eslanaian, the person who sold defendant the towing business, and Kaghazi, Eslanian's towing manager, told defendant the law permitted towing vehicles parked on private property without the owner of the property or his agent being present. The two lawyers, Palmer and Rosen, testified that they discussed with defendant, in lay terms, the split of authority between the federal and state appellate courts over whether section 22658, subdivision (*l*) was preempted by federal law. However, both denied advising defendant that he could legally ignore the statute's requirement that the property owner or his agent be present at the tow.

Rosen testified he told defendant that if he towed a vehicle without the property owner being present and the owner of the vehicle sued defendant in small claims court defendant would lose. Rosen further testified that in the three trials de novo in which he represented defendant in small claims actions, the tow truck drivers all testified that at the time of towing they obtained the required signatures from agents or owners.

Palmer testified that in October 2002 he called defendant to a meeting in his office as a result of complaints he received from the Buena Park police department regarding illegal towing by defendant's company. At that meeting Palmer told defendant that notwithstanding the *Tocher* decision it was his interpretation of the law that when a car is towed from private property the property owner or the owner's agent still needed to be present.

In summary, defendant admitted that he read section 22658, subdivision (*l*) and that he knew the statute required that the property owner or the owner's agent must be present when a vehicle is towed from private property. Furthermore, the lawyer he hired to advise him, and the Buena Park city prosecutor, both told him that the owner of the property or agent had to be present. Defendant does not claim that he did not understand this advice. As to his testimony that the former owner and an employee told him otherwise, the jury was not required to believe he had been so informed or, even giving credence to defendant's testimony, the jury had ample evidence to reject that his belief was in good faith.

Defendant contends the court prejudiced his mistake of law defense by excluding a recorded conversation between him and his towing manager, Tony "Rhino" Fuller, in which defendant stated that in conducting his towing business he did nothing wrong. The court did not err.

Defendant's statement to Fuller was hearsay because it was made outside of court and offered to prove the truth of the matter asserted: that at the time defendant owned the towing business he believed that the law did not require the presence of the property owner or the owner's agent when a vehicle was towed. The statement was inadmissible because hearsay evidence of a declarant's prior mental state is only admissible if the declarant is unavailable. (Evid. Code, § 1251, subd. (a).) Here defendant testified directly as to what he believed the law required during the period from October 2002 to January 2005. Nor was the statement to Fuller admissible as a prior consistent statement under Evidence Code sections 1236 and 791. The only way the statement could have been admitted as a prior consistent statement would have been as rebuttal to an implication by the prosecution that defendant had recently fabricated his testimony about his understanding of the law. (Evid. Code, § 791, subd. (b).) But, for the statement to be admitted under that hearsay exception, it had to have been made "before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (*Ibid*.) Defendant's statement to Fuller did not satisfy that requirement because defendant made the statement after his indictment when he had a motive to fabricate.

Defendant claims his statement to Fuller was admissible as nonhearsay circumstantial evidence of his belief about the law during the period of the alleged conspiracy, October 2002 to January 2005. He does not support this claim with any argument or citation of authority, however. Therefore we treat the issue as waived. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com*. (1999) 21 Cal.4th 352, 366, fn. 2.)

Finally, the court did not abuse its discretion under Evidence Code section 352 in excluding the recording of defendant's conversation with Fuller to impeach Fuller's testimony that defendant initiated the conversation and that the conversation took longer than Fuller had testified and thereby throw doubt on Fuller's credibility. (See discussion in Part IV, *post*.) The court was within its discretion to decide that, in the context of all the testimony, both the inquiries related to trivial, collateral matters that would require more consumption of time than their probative value merited, especially because one of the detectives on the case had already testified that Fuller initiated the call.

IV. FAILURE TO INSTRUCT THE JURY THAT DEFENDANT'S TOWING MANAGER WAS AN ACCOMPLICE

Defendant's towing manager, Fuller, was the chief witness against defendant. Fuller managed defendant's towing operations during the time of the conspiracy, October 2002 to January 2005. Prior to defendant's trial, Fuller pleaded guilty to felony charges in connection with defendant's towing business and was sentenced to one year in jail, five years on probation and ordered to pay restitution to the victims of unlawful tows. Fuller testified that he pleaded guilty to these charges.

Fuller testified that between October 2002 and January 2005, 85 to 90 percent of the tows performed by USA Towing consisted of removing vehicles from private property in accordance with purported contracts between the property owners and USA Towing. Most of these contracts were phony. Fuller and the tow truck drivers would prepare the contracts themselves, either making up the name of an authorized agent for the property owner or forging the name of the actual agent or owner. Many of the tow truck drivers carried signs reading "tenant parking only" and "customer parking only" in

their trucks. They would hang one of these signs next to a car, take a photograph and then tow away the car. The drivers routinely towed cars from private property without the presence of the property owner or the owner's agent contrary to the requirements of section 22658, subd. (*l*)(1). Fuller testified that defendant participated in these practices with his employees. Defendant assisted him in preparing fake towing contracts and, in one small claims case, defendant hired a person to pose as a security guard and testify that he had authorized the towing of a car from private property.

The People do not dispute defendant's contention that Fuller was an accomplice as a matter of law and that the court should have so instructed the jury sua sponte. The People contend, however, that the error was harmless. We agree.

Fuller's testimony was relevant to demonstrate defendant's character for dishonesty thereby weakening defendant's mistake of law defense. (Evid. Code, § 1101, subds. (b), (c).) The court cautioned the jury, however, that an accomplice's testimony must be viewed with caution, and must be corroborated by a nonaccomplice. It also instructed the jury on how to determine whether a person was an accomplice. The only thing the court failed to do was to instruct the jury that it must treat Fuller as an accomplice.

The court's error was harmless because ample evidence corroborated Fuller's testimony. Furthermore, because the jury was informed that Fuller pleaded guilty and admitted his criminal acts they necessarily understood that he was an accomplice. Thirty-seven witnesses testified that their cars had been illegally towed by USA Towing. Most of them had won judgments against the company in small claims court and prevailed on appeal. Furthermore, as discussed in Part III, at page 7, *ante*, defendant's mistake of law evidence was exceedingly weak. It is not reasonably probable, therefore, that defendant would have obtained a more favorable verdict if the court had instructed the jury that Fuller was an accomplice as a matter of law, instead of allowing the jurors to make that determination themselves. (Cf. *People v. Arias* (1996) 13 Cal.4th 92, 143.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.